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The Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 540

G. E. MYERS, Trustee of the estate of Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store,
Petitioner and Appellant below,

vs.

VERNA MAY MATLEY,
Respondent and Appellee below.

RESPONDENT'S BRIEF

in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

WILLIAM M. KEARNEY,
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Of Counsel for Respondent.

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To the Supreme Court of the United States and to the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

OPINIONS DELIVERED IN COURTS BELOW

One opinion was delivered by the United States District Court for the State of Nevada. It was written by District Judge Frank H. Norcross, former Chief

Justice of the State of Nevada, and entered November 25, 1941. The opinion was not reported but is set forth at page 44 of the Record.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (Circuit Judges Garrecht, Denman, and Healy, Judge Healy writing; Judge Denman dissenting) was entered on September 15, 1942. The opinion is set forth at page 66 of the record and is reported in 130 Fed. (2nd) 775. The Circuit Court denied a rehearing October 26, 1942 (R. 86).

JURISDICTION

The jurisdiction of the United States Supreme Court is sought to be invoked under Section 24c of the Bankruptcy Act and under Section 240a of the Judicial Code, 28 U. S. C. A. 347.

STATEMENT OF FACTS

The matter was heard before the Circuit Court on appellant's statement of facts (R. 51). The facts set forth in the petition at page 8 are correct but incomplete. The following facts should be noted and are essential to consideration of the question involved whether it be as stated by petitioner or as stated by respondent.

The bankrupt and his wife at all times considered the property to be their home, (R. 53, 55, 67). The wife was residing on the premises at the time of the filing of the bankruptcy, (R. 54). The District Court of the State of Nevada (R. 55) recognized the premises as having been the homestead of bankrupt and his wife

for several years. (Petitioner herein was not a party to the suit nor were the respective rights of petitioner and respondent litigated therein.) The bankrupt was guilty of extreme cruelty toward his wife, (R. 54). The adjudication of bankruptcy was consented to by the bankrupt the day the petition was filed, (R. 51). Although the property was considered as their home for several years, the bankrupt made no claim for exemption of the homestead (R. 7, 52). The wife filed the formal declaration of homestead (R. 54) and claimed the homestead exemption in the bankruptcy proceedings (R. 7).

The additional facts included in the respondent's statement of the question and those added to the Statement of Facts are necessary as they present a factual situation under which the Nevada law affords a protection to the wife which is lacking in many other jurisdictions. The Nevada law, and it alone, determines the exemption (Section 6, Bankruptcy Act, 11 U. S. C. A. 24).

QUESTION PRESENTED

The Circuit Court stated the question as follows (R. 67):

> "The question before us is whether, in light of the fact that the homestead declaration was not filed until after the filing of the bankruptcy petition, the wife is entitled to have the property excluded as exempt."

Petitioner had similarly stated the question in his appeal to the Circuit Court (R. 57).

The Question Presented as now set forth by petitioner (page 3) is not adequate as it refers to section 70a of the Bankruptcy Act and omits reference to other sections of the Act (e.g. 6 and 7a (8), 11 U. S. C. A. 24 and 25) considered and relied on below and omits certain relevant facts. It is likewise faulty in that it implies that the Circuit Court's decision rests necessarily on its interpretation of Section 70a. (See opinion at R. 72.)

The question may, without unnecessary listing of sections of the Act, be stated as follows:

Whether, under the statutes, decisions and policy of the State of Nevada, in light of the fact that the formal homestead declaration was not filed until after the filing of the bankruptcy petition, the wife of the bankrupt is entitled to have the property excluded as exempt, the property having been considered by the parties for several years as their home and having been used and claimed by the claimant as a homestead at the time of the filing of the bankruptcy petition, and a timely claim of exemption having been made in the bankruptcy proceedings by the wife, the bankrupt having failed to take any action in the proceedings to designate the property as exempt property or to protect such interest as the wife had therein.

The question may also be stated as follows:

Whether, in Nevada, a wife can protect her homestead rights by making a timely claim in a bankruptcy proceeding against her husband for recognition of her homestead exemption and to identify it so as to have

it excluded as exempt, where no formal declaration of homestead was filed prior to her husband's bankruptcy and where the wife was residing on the premises and claiming it as her homestead at the time of the filing of the bankruptcy petition and where the husband wilfully failed to take any action to protect such interest as the wife had.

STATUTES

The relevant provisions of the Nevada Constitution and statutes are set forth in the petitioner's Appendix. Relevant provisions of the Bankruptcy Act and of states other than Nevada are set forth in the Appendix at the end of this brief. Section 8846 Nevada Compiled Laws, 1929, is also set forth therein.

ARGUMENT

A. Correction of Statements as to Circuit Court's Holding

In number I of "Petitioner's Reasons Relied on for the Issuance of the Writ" at page 4, and in the "Specification of Errors" at pages 9 and 10, petitioner incorrectly states the holding of the Circuit Court. A correction is necessary to properly determine if this case is one of the character and importance to justify certiorari. Also, the incorrect statement implies a conflict, which, under a correct statement of the holding of the Circuit Court, is non-existent. (In no way, of course, do we intend to suggest that there is any intentional mis-statement of the Circuit Court's holding.)

At page 4, as one of the reasons for issuance of the

Writ, petitioner represents that the Circuit Court held that the 1938 amendment to Section 70a relaxed the rule of *White v. Stump*:

> —"and permitted a bankrupt to establish a right of exemption after the filing of the petition in bankruptcy."

Also, at page 9 in the Specification of Errors, petitioner states that the Court held that the amendment relaxed that rule—

> "by permitting a bankrupt to establish a right of exemption which was not complete at the time of the filing of the petition in bankruptcy,".

Also, the second specification of error states that the Court held:

> —"that the right of a homestead exemption could be perfected after the filing of a petition in bankruptcy."

The Court did not so hold. The Court stated (R. 71):

> "We entertain no doubt that now, as heretofore, the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; but there is no good reason for believing that under present law the opportunity to identify or select exempt property is irretrievably cut off as of that date."

Throughout the opinion (e.g. R. 68, 71, 74, 75), the Circuit Court recognizes and points out that under the Nevada law the exemption and exemption right exist even though the same might be lost by execution sale if the property were not identified or selected.

Such incorrect statement of the Circuit Court's holding just pointed out is repeated and made the funda-

mental basis of petitioner's argument on pages 12 to 19.

At pages 9 and 10 under the second specification of error, it is stated that the Circuit Court held

> —"that the property in question could not have been sold by execution creditors on the date of the filing of the petition in bankruptcy;"

The Court did not so hold. It stated (R. 74):

> "Until the selection is made—and there is often no statutory machinery for making it—the exemption statute is as a matter of practical necessity no impediment to levy and sale;"

The Court also stated (R. 68):

> "Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt."

At page 10 it is stated that the Court refused to consider "in any way" two Nevada cases. One, the *Lachman* case, is cited by the Court. The rule of those cases and its applicability to this case are also considered (R. 68, 73, 74, 75) without specific reference to the cases by name.

I. Answer to Petitioner's First Point

Petitioner's contention that the Circuit Court's holding and interpretation of section 70a permits the creation of a homestead right after bankruptcy which was non-existent before and such holding is therefore in conflict with *White v. Stump*, is based on an incorrect analysis of the Circuit Court's holding.

Petitioner's point I. in his argument (page 10) deals with the Circuit Court's interpretation of the 1938

amendment to section 70a of the Bankruptcy Act (11 U. S. C. A. 110). *White v. Stump*, 226 U. S. 310, and *Georgouses v. Gillen*, 24 F. (2d) 292, Ninth Circuit, cited by petitioner at pages 11 and 12, were both decided before the amendment. Petitioner concedes that there are no cases other than the instant case dealing with the amendment. There is, therefore, no conflict in the decisions as to the meaning of the amendment.

Petitioner contends that under the Circuit Court's decision there is apparently no definite time which can be set as determining when property actually passes to the trustee and a wide field of speculation is thereby opened up. Such contention misapprehends the Court's decision, as the Court did not make such time indefinite. On the contrary, the Court held in discussing the amendment (R. 71):

> "We entertain no doubt that *now, as heretofore*, the necessary factual basis precedent to the exercise of the right of selection must exist *as of the date of bankruptcy;*" (Italics added.)

There is no uncertainty in section 70a, either before or after the amendment, as to when property passes to the trustee. It provided and still provides that upon the trustee's appointment and qualification, he is vested with the bankrupt's title as of the date of adjudication of bankruptcy. The bankrupt's title to exempt property never passed to the trustee. Before the amendment this exception was stated:

> "except in so far as it is to property which is exempt,"

After the amendment it read:

> "except insofar as it is to property which is held to be exempt,"

The Circuit Court's decision created no field for speculation. As quoted above, it recognized that both before and after the amendment—

> "the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; *but there is no good reason for believing that under the present law the opportunity to identify or select exempt property is irretrievably cut off as of that date.*"
>
> (Italics added.)

It is thus clearly apparent that while the date of bankruptcy is a line of demarkation, it is a date at which the *factual basis* precedent to the exercise of the right of selection must exist. Petitioner contends directly, and by reference (page 12) to the dissent below, that the Circuit Court's decision created or would permit the creation of a homestead and homestead right after the date of bankruptcy. It appears from the above quotation and elsewhere in the opinion that the Circuit Court did not so hold. As pointed out in the italicized portion, it is even clearer now than before the amendment that the *right to identify or select* the exempt property is not cut off by the bankruptcy.

What the Courts below in this case held was that the factual basis did exist and the wife did have the right of selection at the time of the bankruptcy.

Now, the determination of whether the factual basis and the right of identification existed in this particular

case is not a matter of appeal to the discretion of the United States Supreme Court so as to warrant the granting of Certiorari to see if that determination were correct. Such question, when it is seen what the question actually is, is not of the importance which will justify the issuance of the writ. As stated by Justices Brandeis and Holmes in Justice Brandeis' dissent in *Sultan Ry. & T. Co. v. Department of Labor and Industry*, 277 U. S. 135, 72 L. Ed. 820:

> "Treating these writs of error as petitions for certiorari ***, we think that the petitions should be denied. *** It is true that each of these cases presents a question involving the Federal Constitution. But in both the controlling principle is well settled, and the question presented is simply whether on the particular facts it is applicable. Obviously such a question is of no general importance."

Petitioner refers with approval (page 12) to the dissent below. With due and sincere respect to its learned author, we suggest that a straw man is being destroyed in the dissent's discussion of the majority's holding on this point. We do not understand that we are called upon to discuss the dissent in detail because of petitioner's mere reference to it. We feel that the following may, however, save time in the comparison of the two opinions.

The Circuit Court did not (as the dissent suggested that it did—R. 81, 83) hold that the homestead and the exemption right may be created after the bankruptcy.

The Circuit Court did not (as the dissent suggested it did—R. 82) hold that Congress intended to "ameliorate" the position of the wife, a third person. The Cir-

cuit Court made no reference to the wife in considering the amendment. It did refer to the wife's position in considering the Nevada law. The differentiation of *White v. Stump* is based on the differences of the Idaho law considered in that case from the Nevada law involved in the instant case.

The dissent states (R. 83) that under the majority opinion the claimant could wait at his will to create his exemption, perhaps for years. The Circuit Court did not hold or imply that the exemption could be "created" after the date of bankruptcy. It held that the exempt property could be identified or selected after such date. As to delay, the Circuit Court did not hold that the time to so identify or select was unlimited. In fact, the Bankruptcy Act itself sets the time within which the exemptions shall be claimed (Section 7a (8), 11 U. S. C. A. 25). Such time does not, and would not, extend beyond a reasonable period for amendment of schedules. This has been and is the law.

The dissent's discussion of a necessity for an "adjudication" of exemptions (R. 82, 85) is of interest but not relevant to petitioner's reasons for the issuance of certiorari. The procedure provided by statute is for the trustee to promptly set aside the exemptions allowed by law, if claimed, and report thereon to the courts (Bankruptcy Act 47a (6), 11 U. S. C. A. 75). The question of procedure is not involved herein. The Circuit Court in this connection was merely pointing out the significance of the amendment with reference to the right of designation and as to when such designation may be made. It was not considering the exist-

ence of an exemption with relation to the time of such adjudication. In other words, the dissent is suggesting an interpretation of the amendment which may or may not be correct, but which is not necessarily opposed to the Circuit Court's interpretation.

Lastly, the dissent states (R. 83) that the Circuit Court decided that the holding of *White v. Stump* prevents the selection of barber's tools, etc., permitted by state exemption statutes. The Circuit Court did not so decide, but held (R. 74) that if the right of designation were cut off by bankruptcy as contended by petitioner the state exemption law would be nullified. The Court then pointed out, (R. 75) that such exemption statute in Nevada included the homestead (Section 8844 (15) Nevada Compiled Laws, 1929).

We have ventured the above remarks as to the dissent as we believe them relevant to petitioner's claim and the dissent's statement that the Court's decision conflicts with *White v. Stump*. (See petitioner's Reasons Relied on for the Issuance of the Writ, page 4.)

Because petitioner has cited and relies on *White v. Stump*, arising in Idaho, and *Georgouses v. Gillen* (supra), arising in Arizona, rather than because of any belief on our part that those cases are relevant to the issuance of certiorari on the basis of conflict between federal courts, we note the following, which is, however, clearly relevant to petitioner's point II. discussed below.

Both the Idaho and Arizona statutes provide that the homestead does not exist nor is it created until the

filing of a formal declaration. (See above cases for statement of state law; also 5465 and 5469 Idaho Comp. Stat.; 3292 Rev. Stat. of Arizona.) Neither state has a provision such as 8844 (15) Nevada Compiled Laws, 1929, which is a self-executing exemption statute including the homestead among its *present* exemptions. Idaho and Arizona lack statutory and judicial declaration of the protected status of the wife such as has been given in Nevada. (See above references and compare with 3360, 8844 (15), 9882.112 and 9882.113, Nevada Compiled Laws 1929, *Hawthorne v. Smith*, 3 Nev. 182, *First Nat. Bank v. Meyers*, 39 Nev. 235 at 247, 150 Pac. 308 at 312, and see analyses of District Court, R. 46, and Circuit Court, R. 69, 72.) The *Georgouses* case did not involve a wife's rights, and, according to the opinion therein, the property "admittedly" had no homestead status at the time of bankruptcy.

II. Answer to Petitioner's Second Point

Petitioner's point II (page 12) deals with the Nevada law. We have hereinabove (page 5) suggested wherein we believe petitioner's statement as to what the Circuit Court held is in error. We emphasize that correction without here repeating it. We also refer to the above citations contrasting the Idaho and Arizona statutes with those of Nevada.

Section 8844 (15) Nevada Compiled Laws, 1929, (set forth in petitioner's Appendix) provides:

> "The following property *is exempt* from execution, —— 15. And the homestead as provided for by law." (Italics added.)

Petitioner's contention is that the words "as provided for by law" mean a homestead upon which a formal declaration has been filed in accordance with Section 3315 Nevada Compiled Laws, 1929, so that if such declaration was not filed before bankruptcy, the homestead and its exemption did not exist.

The Nevada decisions and statutes show that these words do not have such significance. On rehearing of *First Nat. Bank v. Meyers*, 40 Nev. 284, 161 Pac. 929, at page 930, the Court was considering the contention that the phrase "as provided by law" meant a homestead where a recorded declaration had been filed. The Court stated:

> "Respondent contends that the homestead, 'as provided by law' mentioned in the Constitution, means the homestead as recorded, and that no homestead can be effective for any purpose unless the parties claiming the same shall have first recorded their declaration."

This contention was rejected by the majority of the Court:

> "the Constitution says: 'Laws shall be enacted providing for the recording of such a homestead.' What homestead? The homestead contemplated was instituted by the law of 1865, and the homestead 'provided by (that) law' was a homestead 'consisting of a quantity of land, together with a dwelling house thereon,".

(The homestead is so defined today in section 3315, which is the law of 1865 referred to. The section is set out in petitioner's Appendix.)

Following the above statement of the respondent's

contention, the Nevada Supreme Court makes extensive citation of cases to show that it has been repeatedly held in cases involving the matter of forced sale under execution that words such as "to be selected" have no significance where there is actual occupancy and the value a..l quantity is as prescribed (in other words, where the factual basis exists). The Nevada court quotes the following with approval:

> "The obvious purpose for which the selection is required is only to identify and define the property to which the exemption applies, so as to *distinguish* that which *is exempt* from that which may be sold at the instance of creditors." (Italics added.)

In addition to the Court's declaration in the Meyers case that a homestead "as provided by law" means the land and house and not a homestead which has been recorded, we call attention to Section 3360 Nevada Compiled Laws, 1929, referring to the wife's rights in the—

> "homestead as now defined by law regardless of whether a declaration thereof has been filed or not,"

Clear recognition is given to the fact that in Nevada the homestead as defined by law exists independent of recordation.

The Nevada legislature has elsewhere recognized that the homestead as provided by law does not refer just to a homestead upon which a declaration has been filed. Section 9882.112 Nevada Compiled Laws, 1929, (1941 Stats. 186) provides that the Court or judge shall set apart—

> "the homestead, as designated by the general homestead law then in force, whether such homestead has theretofore been selected as required by law, or not."

The following section (9882.113) gives a similar recognition:

> "If the whole property exempt by law be set apart, and should not be sufficient *** the district court or judge shall make such reasonable allowance ***"

In speaking of *First Nat. Bank v. Meyers* (supra) the Circuit Court comments:

> "Thus, in the situation and for the purposes contemplated by this statute, a de facto homestead right subsists in the wife independently of the filing of a declaration. We think it inescapable that if regard be had for the state law the wife, at least, is not to be surprised into the loss of the right, whether by the husband's voluntary transfer or by his or his creditor's petition in bankruptcy."

It may be stated therefore, that if, as in the instant case, the factual basis exists in Nevada before the bankruptcy, the homestead and the homestead right exist at that time. Neither the homestead nor the homestead right are created in Nevada by the filing of a formal declaration any more than they are created by a claim of exemption in bankruptcy proceedings. The Circuit Court herein held that where the factual basis exists there is no reason why the bankruptcy proceedings cut off the wife's right to identify the exempt property.

The Meyers case (supra) is of further interest in that it announces the state's policy as to protecting the wife's interest in the homestead. The Nevada Supreme Court stated:

> "It is manifest that the policy sought to be established by the legislature was one that would preclude the *possibility* of a wife being divested of the home by acts of her husband, perpetrated either with a design to defraud her, or through misguided or imprudent transactions in which she had no part." (Italics added.)

The policy of the Nevada law as to creditors is stated in *Hawthorne v. Smith*, 3 Nev. 182:

> "If, then, it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, certainly we should not hold that a creditor can defeat that policy by any act of his, unless the statute clearly gives that right."

As we have seen, Section 8844 (15) makes the homestead (that is, the house and land irrespective of any recording) presently exempt by virtue of the statutory declaration.

Nevada cases dealing with Section 8844 (all of which were decided before 1911 when subsection 15 was added) recognize that the property listed in that section was made presently exempt by the section, even though it had not been formally claimed or designated. See *Elder v. Williams*, 16 Nev. 423, *Elder v. Frevert*, 18 Nev. 446, and *Edgecomb v. His Creditors*, 19 Nev. 149. For example, in the last case, the Court held that a livery stable keeper was not one included in the terms of the statute, and stated:

> "If respondent had been engaged in a business that *entitled* him to claim the exemption, the property *would be exempt*, ***." (Italics added.)

Section 8844 was apparently passed pursuant to ar-

ticle I section 14, of the Nevada Constitution (set forth in petitioner's Appendix). A statute similar to section 8844 and passed pursuant to a similar constitutional provision has been held to be self-executing and to exempt the homestead. *Hughes v. Newton,* 89 Fed. 213. The wife's claim of exemption was therein upheld as against the husband's creditors.

The Circuit Court's decision is not in conflict with the two Nevada cases cited by petitioner. They were impliedly differentiated by the Court in its recognition and discussion of the fact that the homestead and the homestead right exist in Nevada (when, as here, there is the necessary factual basis) even though a designation might be necessary to prevent the exemption being lost by sale.

In addition to this, however, in *neither* of the cases (*Lachman v. Walker*, 15 Nev. 422, and *McGill v. Lewis*, 116 Pac. (2nd) 581) was section 8844 (15) before the Court nor did the Court consider it. The *Lachman* case was decided in 1880 and long before its enactment. Whatever inference may be drawn from the language of the Court as to the law at that time, it is clear that the homestead and the homestead right now exist independent of recording. This is true whether or not the actual holding of the case is still law. There is, as the Circuit Court shows, nothing inconsistent between the rule that an exemption exists and the rule that the exempt property must be designated or the right will be waived. It certainly cannot be said that the case involves the "identical question" a. in this

case. The Circuit Court stated the ruling of the Lachman case:

> "Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt. Lachman v. Walker, 15 Nev. 422."

A further important distinction is that in the Lachman case the levy was made *after* the property had been conveyed to plaintiffs, and plaintiffs attempted to vitiate the sale by relying on a homestead which they claimed had been established by plaintiff's *predecessors*. There was no pretense that plaintiffs, the ones owning the property at the time of the levy, claimed the property as their own homestead. It was not a homestead in fact at that time and there had been no formal declaration filed by anyone.

The rights of a wife were not involved in the Lachman case. There has been *no* Nevada case reported where the rights of the wife who was actually residing on the premises have not been protected and the exemption allowed.

The *McGill* case is no exception. That case decided that the form and contents of the formal declaration did not comply with Section 3315 as it failed to state that the claimant was residing on the premises. There was no bill of exceptions before the court, but only the judgment roll which showed that claimants were *not* residing on the premises at the time of sale, but were residing in another county. There was, therefore, nothing on which to base an exemption. The Court expressly stated that because of the state of the record before it, it could not consider or decide what the legal effect

of further showing of fact might be. In other words, the *factual basis* for a homestead was affirmatively shown to be lacking. We have already commented that Section 8844 (15) was not before the Court. Also the same and fundamental differentiation pointed out above as to the Lachman case is equally applicable to the McGill case. The McGill case did not hold that the property was not exempt prior to formal recordation. Apart from any other factor, the clear distinction between the existence of an exemption and the necessity of designating exempt property before sale would distinguish the McGill case from the Circuit Court's decision.

Petitioner's contention as to the trustee's position under Section 70a (5) of the Bankruptcy Act as applied to Nevada law is so completely and succinctly answered by the Circuit Court that we feel it is only necessary to refer to the opinion. (See R. 73, 74, and 71 (130 Fed. (2d) at page 777, headnote 2, and at page 777, headnote 6.)

It is to be noted that under the laws of Nevada a debtor or his wife must be given at least twenty days notice before an execution sale takes place, in which time action may be taken to protect the homestead. (Section 8846 Nevada Compiled Laws, 1929). If petitioner's contention were correct no notice or time whatsoever would be afforded the wife in any bankruptcy proceedings by or against her husband. It is undisputed that the state law controls as to exemptions.

Furthermore, under the Nevada law, at no time could

the husband alone, directly or indirectly, have effectively transferred the property without the wife's signature and consent so as to defeat her homestead (3360 Nevada Compiled Laws, 1929; *First Nat. Bank v. Meyers*, supra.)

Petitioner in effect contends that, notwithstanding the Nevada law, the law could be circumvented and her right could be defeated by the husband's voluntary or involuntary bankruptcy.

III. Answer to Petitioner's Third Point

The contentions made under petitioner's point III at page 18 have been answered by the discussion of the above points. Petitioner states his third point as follows:

> "The writ should be granted since the case of Clark v. Nirenbaum, 8 Fed. (2d) 451, does not sustain the majority opinion of the United States Circuit Court of Appeals for the Ninth Circuit."

We do not understand that such contention, even if it were correct, would justify or be a reason for the issuance of certiorari (United State Supreme Court Rule 38 (5)).

The Clark case is cited twice by the Circuit Court (R. 71, 75; 130 Fed. (2d) 778, 779). We have already pointed out that in Nevada, as in Georgia, the homestead and the homestead right exist independent of formal declaration. The Clark case holds, under the doctrine of White v. Stump, that the designation or selection of such property may be made after bankruptcy.

CONCLUSION

In conclusion, it is submitted that there is no occasion or desirability for the issuance of certiorari or further review. The case is important, but only in a very limited field, to-wit, bankruptcy cases arising in the State of Nevada where the bankrupt's wife claims as exempt a homestead on which no formal declaration has been filed. Though such facts may recur, it seems unlikely. There is admittedly no conflict in the cases as to the Circuit Court's interpretation of 1938 amendment to Section 70a. When the Court's interpretation is considered in the light of its actual limited holding and its possible effect on future cases, it does not seem a question which need be passed on by the Supreme Court.

In no way do we deem that the Circuit Court's decision in this case is in conflict with White v. Stump. Nor do we believe that the decision conflicts with applicable local decisions.

In short, the case is important only to the parties, particularly the respondent, and as a guide in future bankruptcy cases in Nevada which may present similar facts. Except as to the Court's interpretation of Section 70a (and that incidental ruling would not justify certiorari) the case is only the application of established rules to particular facts. It is respectfully submitted that the writ should be denied.

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ROBERT TAYLOR ADAMS,
Of Counsel for Respondent.

APPENDIX

Section 6 of the Bankruptcy Act (11 U. S. C. A. 24) reads:

"This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however*, That no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this title for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess."

The relevant portion of Section 7 of the Bankruptcy Act (11 U. S. C. A. 25 (8)) reads:

"The bankrupt shall *** (8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their

residence, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated, or disputed; and a claim for such exemptions as he may be entitled to; all in triplicate, one copy for the clerk, one for the referee, and one for the trustee: *Provided*, That the court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses; ***."

The relevant portion of Section 47 of the Bankruptcy Act (11 U. S. C. A. 75a. (6).) reads:

"Trustees shall *** (6) set apart the bankrupts exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; ***"

The relevant portion of Section 70 of the Bankruptcy Act (11 U. S. C. A. 110a. (5).) now reads:

"The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this title, except insofar as it is to property *which is held to be exempt*, to all *** (5) property,

including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: ***"

(Note: The italicized portion above, prior to the 1938 amendment, read: "which is exempt,")

The Appendix to petitioner's brief sets forth Article I, Section 14 and Article IV, Section 30 of the Nevada Constitution. It also sets forth Sections 3360, 8844, and 3315, Nevada Compiled Laws, 1929.

The relevant portion of Section 8846, Nevada Compiled Laws, 1929, reads:

"Before the sale of property on execution, notice thereof shall be given as follows: *** 3. In case of real property, by posting a similar notice particularly describing the property, for twenty days, successively, in three public places of the township or city where the property is situated, and also where the property is to be sold; and also by publishing a copy of said notice once a week, for the same period, in a newspaper, if there be one, in the county; ***"

The relevant portion of Section 5465, Idaho Comp. Stat., reads:

"From and after the time the declaration is filed for record the premises therein described constitute a homestead."

Section 5469 Idaho Comp. Stat. reads:

"From and after the time the declaration is filed for record the land described therein is a homestead."

The revelant portion of Section 3292 R. S. 1913, Arizona (1733 Rev. Code 1928) reads:

"Exempt from time of filing. The homestead shall, from the date of recording the claim, be exempt from attachment, execution and forced sale, and from sale under any judgment or lien existing prior to the recording of such claim, ***"